

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 December 2004**

**BALCA Case No.: 2004-INA-1**  
**ETA Case No.: P2002-MD-03380275**

*In the Matter of:*

**NEW WAY INTERNATIONAL, INC.,**  
*Employer,*

*on behalf of*

**SHUEN-CHUAN R. LAN,**  
*Alien.*

Certifying Officer: Stephen W. Stefanko  
Philadelphia, Pennsylvania

Appearance: Yea-Tung Hung, Esquire  
Vienna, Virginia  
For the Employer and the Alien

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by New Way International, Inc. (“the Employer”) on behalf of Shuen-Chuan R. Lan (“the Alien”) for the position of Market-Research Analyst I. (AF 14-17).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer’s request for review, as contained in the Appeal File (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

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<sup>1</sup> Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup> “AF” is an abbreviation for “Appeal File.”

## **STATEMENT OF THE CASE**

On April 24, 2001, the Employer filed an application for alien employment certification on behalf of the Alien for the position of Market-Research Analyst I. (AF 14-17). Four years of college and a Bachelor's degree in marketing or economics constituted the minimum job requirements. (AF 14). No experience or other special qualifications were required.

On January 28, 2003, the Employer's reduction in recruitment request was denied and the Employer was directed to place a Sunday advertisement in conjunction with a 10-day job order. (AF 23-24). The advertisement appeared in the March 2, 2003 edition of The Washington Times. (AF 25).

On July 9, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the Employer illegally rejected a U.S. worker.<sup>3</sup> (AF 11-12). The State Workforce Agency provided the Employer with a list of five worker referrals, two of whom were interviewed. Applicant #1 met the education requirement. (AF 12, 18). Applicant #1 has both a Bachelor's and a Master's degree in Economics, but was rejected for his lack of experience in marketing. (AF 12, 21-22).

On August 12, 2003, the Employer filed a rebuttal to the NOF asserting that while Applicant #1 possesses the requisite education, he has no basic knowledge in marketing and no work experience in economics or marketing since receiving his Master's degree in 1996. (AF 8-10). The Employer claimed that Applicant #1 was not hired due to his failure to demonstrate his ability to perform the job duties during the interview rather than a lack of experience.

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<sup>3</sup> Two potential workers were named in the NOF as illegally rejected, but the Employer successfully rebutted the NOF regarding the rejection of one of these two workers on the basis that she possessed a Bachelor's degree in Communications, rather than Economics, as was required on the ETA 750A.

On August 18, 2003, the CO issued a Final Determination (“FD”) denying certification on the ground that the Employer failed to provide a lawful job-related reason for rejecting a U.S. worker. (AF 6-7). The CO stated that Applicant #1 exceeded the sole requirement of a Bachelor’s degree in Marketing or Economics, but was nevertheless rejected for lack of experience when none was required. The CO determined that the Alien had received a Bachelor’s degree in Economics in 1981, worked as a Teacher/Manager in a Kindergarten school from 1991-1996, and had been unemployed since 1996.

On September 22, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on October 7, 2003. In the Request for Review, the Employer stressed the importance of the interview in determining an applicant’s ability to perform the job duties and argued that the Employer’s right to “freedom of employment cannot be unreasonably deprived because [the Employer is] filing an application for [e]mployment [c]ertification.” (AF 1-5).

## **DISCUSSION**

U.S. applicants who meet the Employer’s minimum job requirements may not be rejected as unqualified. *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989) (*en banc*). Such a rejection is a flagrant violation of 20 C.F.R. § 656.21(b)(6) which requires employers to “clearly document ... that all U.S. workers who applied for the position were rejected for lawful job related reasons.” *Id.* A qualified U.S. worker may not be rejected for failure to satisfy job requirements which were not listed on the application form. *D.N.A., Inc.*, 1988-INA-18 (May 9, 1988).

The Employer cites general lack of knowledge and lack of experience for a job that requires nothing more than a Bachelor’s degree in Economics according to Boxes 14 and 15 on the ETA 750A. (AF 14). Applicant #1 clearly exceeded this minimum requirement, as he possessed both a Bachelor’s and a Master’s degree in Economics. An employer may not belatedly seek to add more restrictive requirements and use them as a

basis for rejecting a U.S. worker. *Metal Cutting Corp.*, 1989-INA-90 (Jan. 8, 1990). This is exactly what the Employer is attempting to do in this case. Rather than disputing whether Applicant #1 meets the actual minimum job requirements, the Employer seeks to introduce evidence of the applicant's lack of knowledge and disinterest in the position. The Employer's General Manager asserts in an affidavit attached to the Request for Review that Applicant #1 demonstrated very little knowledge in response to questions asked during the interview. (AF 4). The General Manager further states that in his opinion, Applicant #1 "was only looking for something to held [sic] him over until he could move on to something more of his choosing."<sup>4</sup>

This case is readily distinguishable from *Texas Instruments, Inc.* which held that due to the rapidly changing technology involved in the semiconductor industry, current knowledge was required. *Texas Instruments, Inc.*, 1988-INA-413 (May 23, 1989) (*en banc*). However, that case required two years of experience whereas no experience is required in this case. The Employer here expresses some concern about Applicant #1's "employment gap" in the fields of economics and marketing since receiving his Master's degree in 1996. However, the Alien received his Bachelor's degree in 1981, has never been employed in the field of economics or marketing, and furthermore, has been unemployed since 1996. As the CO stated in his FD, "[I]t is unacceptable to reject otherwise qualified U.S. workers for requirements which are neither met by the [A]lien nor ... reflected on the application." (AF 7).

"An applicant is considered qualified for a job if he meets the minimum requirements specified for that job in the labor certification application." *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988). Without evidence that the applicant's resume is factually incorrect, an employer is not permitted to merely assert that the applicant is unqualified when the applicant, according to his resume, meets the minimum job requirements. *Vanguard Jewellery Corp.*, 1988-INA-273 (Sept. 20, 1988). While the Employer alludes

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<sup>4</sup> "An employer's bare assertion, in the absence of supporting reasons or evidence, that a U.S. applicant was not interested in the position is insufficient to prove rejection for a lawful job-related reason." *Custom Card*, 1988-INA-212 (Mar. 16, 1989) (*en banc*). The applicant indicated an interest in the job by applying for it and seeking an interview. *National Semiconductor*, 1988-INA-301 (Mar. 3, 1989) (*en banc*).

in its NOF rebuttal that Applicant #1's credentials listed in his resume may be fraudulent, it fails to provide a single trace of evidence to support this proposition. (AF 8).

The burden of proving that Applicant #1 was not hired for a lawful job-related reason is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The Employer has failed to proffer such a reason for the rejection of this applicant and remains in violation of 20 C.F.R. § 656.21(b)(6). As such, labor certification was properly denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten

pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.